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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 646 (Sub-No. 3)**

**WAYBILL DATA RELEASED IN THREE-BENCHMARK  
RAIL RATE PROCEEDINGS**

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**REPLY COMMENTS OF  
CANADIAN PACIFIC RAILWAY COMPANY**

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**Dated: December 21, 2010**

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Pursuant to the decision served in the above-captioned proceeding on October 22, 2010 (the "*October 22 Decision*"), Canadian Pacific Railway Company and its U.S. rail carrier affiliates, Soo Line Railroad Company, Dakota, Minnesota and Eastern Railroad Corporation and Delaware and Hudson Railway Company, Inc. (collectively, "CP") submit these Reply Comments regarding the Board's proposal to permit parties to rate proceedings brought under the Board's "Three Benchmark" methodology to select their comparison traffic group from the defendant's unmasked Waybill Sample data for the four (4) years corresponding with the most recently published Revenue Shortfall Allocation Method ("RSAM") figures. For the reasons set forth below and in CP's Supplemental Comments filed on November 23, 2010, CP urges the Board not to adopt the proposed rule. Instead, the Board should consider available alternatives to the proposed rule, including the use of the defendant carrier's most recent full traffic data in lieu of the more limited data available in the Waybill Sample.

The comments filed in response to the *October 22 Decision* provide no evidentiary support for the proposed rule. The only party to file comments supporting the Board's proposal was the so-called "Interested Parties," a coalition of shipper associations that previously filed joint comments in response to the Board's April 2, 2010 *NPRM Decision*. However, the

Interested Parties' current submission, which consists of a single page, simply adopts by reference their prior comments and does not address the statement of the Board's rationale for, and regulatory objectives in proposing, the rule at issue set forth in the *October 22 Decision*. Nor do the Interested Parties' prior comments support adoption of the proposed rule – to the contrary, those comments illustrate why the use of Waybill Sample data dating back five or six years would be inconsistent with the fundamental purpose of the R/VC<sub>COMP</sub> benchmark.

In their prior comments, the Interested Parties argued that

“Because any rate prescription will be for a 5 year period, it is important to prescribe a rate that is based neither upon the peak nor the trough of the business cycle. Changes and fluctuations in market conditions over time are precisely why a multi-year average of comparable rates is necessary to make the best determination of a maximum reasonable rate over the long run.”<sup>1</sup>

Joint Opening Comments of Interested Parties, filed May 3, 2010 at 5-6 (emphasis added).

Indeed, the Interested Parties went so far as to suggest that the Board require that comparison traffic groups be drawn from four years of Waybill Sample data unless a party can “justify[ ] its decision to use only a temporal subset of Waybill traffic.” *Id.* at 8.

The fundamental flaw in the Interested Parties' position is that the test of rate reasonableness under the Three Benchmark methodology is not whether the challenged rate is consistent with historical averages or “long-term trend[s].” Rather, as the Board made clear in *Simplified Standards*, “[t]he whole purpose of the Three Benchmark approach is to determine where the challenged rate falls in comparison to other similarly situated traffic.”<sup>2</sup> In particular, the R/VC<sub>COMP</sub> benchmark is intended to evaluate whether the challenged rate is consistent with

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<sup>1</sup> See also Joint Reply Comments of Interested Parties, filed June 1, 2010, at 6 (arguing that “a single year of data would not be representative of the long-term trend and thus would be inappropriate for prescribing rates over a five year period.”)(emphasis added)

<sup>2</sup> Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, Decision served September 5, 2007 (“*Simplified Standards*”) at 80 (emphasis added).

current demand and market conditions by comparing the R/VC ratio produced by that rate with those generated by other contemporaneous movements with similar operating characteristics. In order to make a meaningful comparison, it is critical that the analysis be based upon movements that occurred under the same market conditions as the issue traffic.<sup>3</sup> Use of the most current available traffic data in selecting the comparison group assures that the R/VC<sub>COMP</sub> analysis truly reflects "similarly situated traffic." *Simplified Standards* at 80. By contrast, permitting – much less mandating – an R/VC<sub>COMP</sub> analysis based upon Waybills Sample data that are five or six years old would, in effect, establish an entirely different rate reasonableness standard – consistency with long-term rate trends – that is fundamentally inconsistent with the stated objective of the Three Benchmark methodology. For that reason, the Board should not authorize the selection of comparable traffic group movements from outdated multi-year Waybill Sample data.

The Comments filed by the Association of American Railroads ("AAR") in response to the *October 22 Decision* offer a sensible alternative to the proposed rule.<sup>4</sup> Specifically, AAR suggests that, instead of adopting a rule under which the parties would draw their comparison traffic groups from four years (or even one year) of Waybill Sample data, the Board consider establishing a procedure that would enable the parties to select comparable movements from the defendant carrier's most recent 100% traffic tape. AAR Comments at 5. As AAR observes, such a procedure – which the Board itself suggested as a solution in cases where the Waybill Sample does not contain a sufficient number of comparable movements – could readily be

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<sup>3</sup> The Board itself has acknowledged that the use of traffic data that are "too old to be reliable" would undermine the accuracy of Three Benchmark rate determinations. *October 22 Decision* at 3.

<sup>4</sup> CP joined in the Comments submitted by AAR on behalf of the railroad industry.

applied in all Three Benchmark proceedings. *Id.* CP believes that AAR's proposed alternative has merit, for several reasons.

First, utilizing the defendant carrier's complete traffic data for the most recent period would moot the primary objection to reliance on the most recent year's Waybill Sample data – *i.e.*, that one year of Waybill data may not contain a sufficient number of movements of the issue commodity (or similar commodities) to enable the parties to develop an appropriate comparison group. The defendant railroad's traffic tape would contain 100% of the shipments of the issue commodity handled by that carrier during the most recent period. Access to all of the defendant carrier's issue commodity movements would provide ample data from which to select a meaningful comparison group in all but the most unusual circumstances.<sup>5</sup> Substituting the defendant carrier's traffic data for Waybill Sample data would also eliminate any concern that Waybill data (which include only a 1-2% sample of each carrier's traffic) for a given year might contain only "aberrational" or "non-representative" movements.

Second, utilizing the defendant railroad's traffic data for the most recent time period would address the concern that an analysis based upon "stale" multi-year Waybill Sample data would produce "inaccurate" R/VC comparisons that do not reflect current market conditions. Rates and R/VC ratios for movements of the same commodity as the issue traffic, occurring during the same time period as the issue movements, should reflect the same demand characteristics and market forces as the issue movements themselves. Basing the Three Benchmark analysis on a comparison group drawn from the defendant carrier's contemporaneous traffic would promote the stated purpose of the Three Benchmark approach:

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<sup>5</sup> If such an extraordinary case were to arise, the problem could be addressed by expanding the defendant carrier's data to include movements of commodities similar to the issue movements.

to determine where the challenged rate falls in comparison to other "similarly situated traffic." *Simplified Standards* at 80.

Third, selection of a comparison traffic group from the defendant carrier's traffic tapes holds the potential to reduce the frequency of disputes regarding the "comparability" of other movements to the issue traffic. In many cases, a 100% traffic tape would contain enough movements of the issue commodity to enable the parties to develop appropriate comparison groups consisting entirely of the same commodity. This would eliminate disagreements regarding the "comparability" of commodities that share some characteristics with the issue traffic but which also exhibit one or more significantly different operating attributes. Moreover, as AAR observed, if comparison groups were drawn from the defendant carrier's most recent traffic tapes, rather than the small sample of that traffic contained in the Waybill Sample, "there would be no issue of 'aberrational data.'" AAR Comments at 6.

Finally, substituting the defendant carrier's traffic data for the more limited Waybill Sample data would promote the objectives set forth in the Board's *October 22 Decision*. In proposing to make four years of Waybill Sample data available to the parties, the Board observed that its proposal would "provide the parties with more data from which to choose, which should assist the parties in selecting a comparison group that more closely resembles the issue traffic." *October 22 Decision* at 3. The defendant carrier's most recent traffic tape should, in virtually every instance, contain more movements of the issue commodity than even four years of Waybill Sample data. More importantly, the data set forth in the traffic tape would be more probative of the reasonableness of the challenged rate than multi-year Waybill data, because the traffic tape would reflect shipments that took place contemporaneously with, and under the same market circumstances as, the issue movements.

In summary, the Board should – indeed, it must – consider available alternatives to the proposed rule. This is especially true where, as here, there is an alternative to the use of outdated Waybill Sample data that would both simplify the comparison group selection process and produce more reliable Three Benchmark analyses. CP urges the Board to give serious consideration to replacing the Waybill Sample with the defendant carrier's most recent traffic data as the source from which comparison group movements are drawn in Three Benchmark rate proceedings.

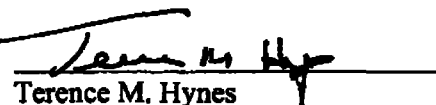
### CONCLUSION

For the reasons stated in these Reply Comments and in CP's prior submissions, the Board's proposal to permit parties to draw their comparison traffic group in Three Benchmark cases from four years of Waybill Sample data should not be adopted.

Respectfully submitted,

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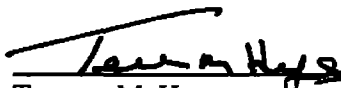
  
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Dated: December 21, 2010

### **CERTIFICATE OF SERVICE**

I hereby certify that I have caused a copy of the foregoing Reply Comments of Canadian Pacific Railway Company to be served by first class mail, postage prepaid, this 21st day of December 2010 to all parties of record.

  
Terence M. Hynes